2009 DRAFTING REQUEST

Bill

Received: **09/05/2008**

Received By: **gmalaise**

Wanted: **09/15/2008**

Identical to LRB:

For: **Robert Jauch (608) 266-3510**

By/Representing: **Mark Mitchell**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact:

Addl. Drafters:

Subject: **Children - out-of-home placement**
Children - TPR and adoption

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Jauch@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Indian child welfare

Instructions:

Redraft 07-0174/4 but with changes in 7/28/08 drafting instructions and 6/25/08 Kiel memo

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	gmalaise 09/05/2008	wjackson 09/16/2008		_____ _____			
/1			phenry 09/19/2008	_____ _____	mbarman 09/19/2008		S&L
/2	gmalaise 03/06/2009	wjackson 03/12/2009	rschluet 03/13/2009	_____ _____	mbarman 03/13/2009		S&L
/3	gmalaise	wjackson	mduchek	_____	sbasford	cduerst	

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
	08/13/2009	08/18/2009	08/18/2009	_____	08/19/2009	08/27/2009	

FE Sent For: "13" @ intro. 9/14/09 **<END>**

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For: **Children and Families 4-9836** Sen. Jauch

By/Representing: **Mark Mitchell**

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Children - TPR and adoption

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Requester's email: **mark.mitchell@wisconsin.gov**

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/?	gmalaise	1 WLJ 9/16	9/17 pg/100	9/19 pg/15			

FE Sent For:

<END>

CODIFICATION WORKGROUP

Wintergreen Conference Center
Wisconsin Dells, Wisconsin

July 31, 2008

9:30 AM to 4:30 PM

AGENDA

9:30	Welcome and Introductions
9:45	Review Meeting Notes July 7, 2008
9:55	Review Agenda and Attendance by Mike Vruno, Children and the Law
10:00	"Home-Work Assignments" o Active Efforts: WI/IA v MN – Mark Mitchell o Good Cause/Advanced Stage – Bridget Bauman/Loa Porter o Revised Bill Summary – Katie Plona/Kris Goodwill o Definition of Diligent – Mark Mitchell o Definition of Reservation – Mark Mitchell o Emergency Removal – Caroyl Long o Iowa Supreme Court Analysis – Dennis Puzz
12:00	Lunch
12:45	Drafting Instructions
2:30	Update Codification Strategies Child and Family Law Committee Meeting Scheduled Conference/Meetings o WCHSA o CASA o BIA Conference
4:15	What Next?
4:30	Adjourn

BILL DRAFTING INSTRUCTIONS
LRB-0174/4

Section	Page	Line(s)	Comment
9	13	24-25	**Workgroup, we decided to take out the last clause because it seemed redundant. But as I read it more, it is not redundant. The definition says that a parent includes an Indian person who adopts an Indian child, but, without that last clause, one could read it to also include a non-Indian person who adopts an Indian child. So I recommend we leave it in.**
10	14	7-10	Remove the added language and include under s. 48.028. By including it here, it changes the definition of relative for other purposes [e.g., Kinship Care under s. 48.57(3m)]. This definition should only apply to ICWA proceedings. May want to add language like "For purposes of the application of s. 48.028 . . ." to s. 48.02(15); see similar language in Section 9, Page 13, Lines 21-25.
13	15	*** GM	Gordon, can we define "child custody proceeding"? The issue is when does a child custody proceeding start. For example, an emergency removal under s. 48.19 is not a child custody proceeding and we do not want to require active efforts or qualified expert witnesses at the temporary physical custody hearing under s. 48.21, but we want to be somewhat specific about when the first active efforts, rather than reasonable efforts, finding has to be made. Should we have a specific point in time as the starting point? Should placement priorities begin right away, while active efforts, qualified expert witness, etc. start at a later date?
13	15	21	After line 21, insert "(ag) "Certified mail" means a service offered by the United States Postal Service and, for purposes of this chapter, includes the additional service of return receipt."
13	16	20	Before the period, insert ", but where parental rights have not been terminated."
13	17	8	Replace "extensive" with "substantial"
13	17	8	"Speciality" should be "specialty"
13	17	24-25	This indicates that a tribe has exclusive jurisdiction over an Indian child custody proceeding unless otherwise vested in the state by federal law. This language, taken from ICWA at s. 1918(a), obviously refers to P.L. 280. In our summary of the bill for presentation to interested groups, we don't make this distinction, saying just that tribes have exclusive jurisdiction for Indian children residing or domiciled on the reservation. Do we need to make this clearer in the bill (we obviously need to make it clearer in the summary document).
13	18	23	Insert "the" after "or"
13	19	3	Delete "any of the following."
13	19	4	Delete all of line 4
13	19	4	**Workgroup: We discussed this at a couple different points at our last meeting. I have somewhat conflicting notes. Thoughts?** Delete this language and add the following: "The proceeding was at an advanced stage when the petition to transfer was received, the petitioner did not file the petition promptly after receiving notice of the hearing, and the notification requirements under this chapter were met in a timely manner." Gordon, we want to somehow tie this to the "stages of a case" (see comment below re: Section 13, Page 20, Lines 4-22) so that this would apply only to a placement in foster care subsequent to that notice and so that that notice can't be considered if the proceeding is now related to termination of parental rights.

Section	Page	Line(s)	Comment
			Workgroup: We can also deal with this issue (i.e., describing "advanced stage" in the administrative rule.
13	19	5	Delete "b. That" and insert "that"
13	20	4-22	Needs to be clarified that the only notice that needs to be sent certified mail is the first hearing in each case. For example, the tribe must be provided with certified mail notice of the first hearing in a CHIPS case, the first hearing in a TPR case, and the first hearing in an adoption case. Currently, the language indicates that such notice must be provided at the first hearing at the plea, fact-finding, and dispositional stages.
13	20	7	Delete "court or". Under ICWA, the party seeking the action is responsible for the notification.
13	20	7	At the end of that line, add "except in a hearing under s. 48.21(1),"
13	20	8 GM	Gordon, we probably need to split this paragraph up somehow. The notification, when it is a return of custody, is not required under s. 1916(a) for the former parent or former Indian custodian. In certain circumstances, those individuals may petition for return of the child, but notice is not required – and may not be possible if the return of custody is several years after a termination of parental rights, for example.
13	20	20	After "interior" insert "or until at least 10 days after notice to the appropriate tribe by the U.S. secretary of the interior"
13	21	12	Delete "The" and insert "Except at a hearing under s. 48.21(1), the"
13	21	13	After "home" insert "in which the child resided with an Indian custodian or parent, as defined in s. 48.02(13)"
13	21	19	Remove "by clear and convincing evidence" since the evidentiary standard applies to the damage to the child, not the active efforts.
13	21	22	After "court" insert "or jury"
13	22	8	Remove "beyond a reasonable doubt" since the evidentiary standard applies to the damage to the child, not the active efforts.
13	22	12	Renumber s. 48.028(4)(f)(intro.) as 48.028(4)(f)1.
13	22	14-17	Renumber s. 48.028(4)(f)1. to 4. as s. 48.028(4)(f)1.a. to d.
13	22	17	Create s. 48.028(4)(f)2. to read: "2. A lower order of preference shall not be chosen if the sole reason for that choice is that a higher order of preference was not possible because the court did not allow that person to participate in the proceeding by telephone or live audiovisual means as prescribed in s. 807.13(2)."
13	22	21-22	**Workgroup, just want to check if this language is OK. We had some discussions earlier in which we said that active efforts should not be seen as "reasonable efforts plus." This current language, though, kind of says that.**
13	22	23	Add "described" after "as"
13	23	3	After "court's" insert "or jury's"
13	23	5-20	**Workgroup: Let us have additional discussion and a specific look at the Minnesota language.**
13	23	10-11	**The number of family members that have to be consulted will be dealt with in the administrative rule. Should reflect good social work practice. Workgroup – define in statute?**
13	23	12	**The issues of "frequent" and by whom visits must be made will be dealt with in the administrative rule. Should reflect good social work practice. Workgroup – define in statute?**
13	23	14	Delete "appropriate"
13	23	15	Insert "culturally" after "alternatives"
13	25	10	Put a period at the end of the line

by definition

by definition

No 25 USC 1913(d) - DV site

Section	Page	Line(s)	Comment
13	25	11	Delete the entire line. The parent would have to petition for return of custody; it isn't automatic
13	25	18	Delete "sub. (3), (4), or (5) or"
13	26	3	Renumber s. 48.028(7)(b)(intro) as s. 48.028(7)(b)1.
13	26	12-17	Renumber s. 48.028(7)(b)1. to 4. as s. 48.028(7)(b)1.a. to d.
13	26	19	After Line 19, create s. 48.028(7)(b)2. to read: "Placement preferences under this paragraph shall also be followed in any placement under s. 48.20 to the extent permitted by availability and emergency conditions. Placement preferences shall be followed as soon as possible when emergency conditions are resolved."
13	27	19	"Export" should be "expert"
13	27	22	Replace "active" with "diligent"
13	27	23	Delete ", as described in sub. (4)(g),"
***	30	**	Gordon, do we need a sentence at the end of s. 48.133 indicating that, in the case of unborn CHIPS, if the mother is an adult ICWA does not apply. Or is that common sense?
40	39	1	After "the" insert "petitioner knows or has reason to know that the"; Delete "or may be"; After the second "child" insert "and the child is being held in custody or placed outside the home"
40, etc.	39	5	See Joyce Kiel's analysis. We need to be clear that active efforts have to be made by the state/county, rather than a specific person employed by the state/county. County structures are different and we don't want to have a problem if someone other than, for example, the intake worker makes the active efforts but the statute says they must be made by the intake worker. The workgroup suggested that we attempt to create some language for the introduction about establishing a working relationship between tribes and the state and tribes and the counties. This could also be dealt with in the administrative rule.
40	39	7	Delete "If the child is or may be an Indian child and"
40	39	8	Delete "is being held in custody outside of his or her home,"; Replace "the" with "The"
42	39	17	After "If" insert "the petitioner knows or has reason to know that"; Delete "or may be"; After "child" insert "and the child expectant mother is being held in custody or placed outside the home"
42	39	24	Delete "If the child expectant mother is or may be an Indian child and"
42	39	25	Delete "is being held in custody outside of her home,"; Replace "the" with "The"
50	43	10-11	Pursuant to style changes in other bills, "the time of" in both lines should be removed
52	43	22	After "determines" insert "or has reason to know"
52	43	23	Delete "or may be"; Replace the second "may" with "will"
55	45	8	Insert a comma after "consent"
58	46	6-10	Gordon, is there a reason that the language here re: 48.42 only relates to ICWA cases? Shouldn't the evidentiary burden language also relate to non-ICWA cases under s. 48.42?
60	46	21	Replace "is or may be" with some version of "knows or has reason to know" – I've tried!
***	47	***	Gordon, there was a suggestion that ss. 48.32 and 938.32 include language re: placement preferences, the serious emotional or physical damage to the child/qualified expert witness finding, and the active efforts findings when there is a consent decree that maintains a child in an out-of-home care placement. What is your opinion? If something is added, we would also want the same language as described below re: Section 70, Page 50, Line 2.

Section	Page	Line(s)	Comment
70	49	17	Delete "supported by clear and convincing"
70	49	18	Delete "evidence"
70	50	2	After the period, insert "These findings are not required if they were made at a previous hearing in the case unless circumstances warrant otherwise."
78	52	11-19	This should be deleted. These changes in placement would involve only those involving a move from one out-of-home placement to another or from out-of-home to in-home. As such, there would be no need for a notice to be sent by certified mail.
95	61	12	After "Indian child" insert "placed in out-of-home care"
105	65 66	17-25 1-20	Gordon, paragraphs (a) and (d) don't apply to Indian children, at least with respect to the findings of active efforts to prevent the breakup of the Indian family. In addition, this language should be in s. 48.38 because it affects all children. Do we need it in this bill?
105	66	12-14	Gordon, if this language stays (see above comment), it should be revised to reflect the federal language re: a right to be heard rather than an opportunity.
107	67	17	After "interior" insert "or at least 10 days after notification of the child's tribe by the U.S. secretary of the interior". We may need to make this change in other places as well. The point is that they don't have to wait for the full 10 or 25 days if the tribe is notified and responds within those timeframes.
116	71	9-16	Delete the sentence beginning "If services for the child"
117	71	23	Delete this section
121	72	22	Delete "If" and replace it with "Except for cases under s. 48.41, if"
123	73	13	Delete "No" and replace it with "In the case of an involuntary termination of parental rights, no"
129	75	3-22	Delete this section.
143	78	24	After "the" insert "court knows or has reason to know that the"; Delete "or may be"
167	88-89	20-25 1-7	Delete this section.
179	95	14	Leave in this definition of "reservation." To keep this clean, we want to add the definition of "reservation" only as it relates to ICWA. At some point in the future, the Department may propose legislation making the definition of "reservation" consistent throughout Chs. 48 and 938.
199	102	7	"(am)" should be "(ag)"
200	102	13-14	Delete "in lieu of ordering an investigation under par. (a),"
200	102	15	Delete "if that department consents,"; After the period, insert "If the tribal child welfare department consents, this investigation may be accepted in lieu of the investigation under par. (a)"
213-224	105-108	21-25 1-20	Delete all of these sections. This is not related to ICWA. The Department will likely, in a separate bill, be revising s. 48.981 and these changes will be made at that time.
229	110	5-6	Leave in this definition of "reservation." To keep this clean, we want to add the definition of "reservation" only as it relates to ICWA. At some point in the future, the Department may propose legislation making the definition of "reservation" consistent throughout Chs. 48 and 938.
245	117	9	Delete "any of the following:"
245	117	10	Delete the entire line.
245	117	11	Delete "b. That" and replace it with "that"
245	118	12	Delete "court or"
245	118	13	After "placement" insert ", except in a hearing under s. 938.21(1),"
245	118	23	After "interior" insert "or until at least 10 days after notice to the child's

Section	Page	Line(s)	Comment
			tribe by the U.S. secretary of the interior."
245	119	14	Delete "The" and replace it with "Except at a hearing under s. 938.21(1), the"
245	119	16	After "home" insert "in which the child resided with an Indian custodian or parent, as defined in s. 938.02(13)"
245	119	22	Delete "by clear and convincing evidence"
245	120	3	Renumber s. 938.028(4)(e)(intro.) as 938.028(4)(e)1.
245	120	5-8	Renumber s. 938.028(4)(e)1. to 4. as s. 938.028(4)(e)1.a. to d.
245	120	8	Create s. 938.028(4)(e)2. to read: "2. A lower order of preference shall not be chosen if the sole reason for that choice is that a higher order of preference was not possible because the court did not allow that person to participate in the proceeding by telephone or live audiovisual means as prescribed in s. 807.13(2)."
245	121	5	Delete "appropriate"
245	121	6	After "alternatives" insert "culturally"
252	126	8	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
252	126	10	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
252	126	13	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
252	126	15	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
253	126	20	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
254	126	22	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
255	127	5	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
256	127	16	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
256	127	17	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
257	127	24	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
258	128	5	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
258	128	8	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
258	128	12	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
284	134	7	After "the" insert "petitioner knows or has reason to know that the"; Delete "or may be"; After the second "juvenile" insert ", the juvenile is being held in custody or placed outside the home,"
284	134	14	Delete "If the juvenile is or may be an"
284	134	15	Delete entire line.
284	134	16	Delete "(7), and is being held in custody outside of his or her home, the" and insert "The"
298	138	5	After "determines" insert "or the court has reason to know"; Delete "or may be"
300	139	4	Before "Indian custodian" insert ", if it is an Indian juvenile custody proceeding,"
305	140	18-19	Need to make the change re: may be an Indian vs. knows or has reason to

Section	Page	Line(s)	Comment
			know. I tried some language and couldn't make it fit!
313	143	19	After the period, insert "These findings are not required if they were made at a previous hearing in the case unless circumstances warrant otherwise."
321 324	146 148	14-17 12-15	Gordon, we want to make sure that it is clear that in imposing sanctions, there is a need for active efforts but not for the use of a qualified expert witness or serious damage finding. **Workgroup, do we need more discussion on this?**
327	149- 150	23-25 1-7	This should be deleted. These changes in placement would involve only those involving a move from one out-of-home placement to another or from out-of-home to in-home. As such, there would be no need for a notice to be sent by certified mail.
345	158	7	After "(7)" insert "and who is placed in out-of-home care"
357	163- 164	5-24 1-11	Gordon, paragraphs (a) and (d) don't apply to Indian children, at least with respect to the findings of active efforts to prevent the breakup of the Indian family. In addition, this language should be in s. 48.38 because it affects all children. Do we need it in this bill?
***	***	***	Gordon, agencies must provide notice to parents, Indian custodians, and tribes or the Department of the Interior. A hearing cannot be held until at least 10 days after receipt of notice by the party. We have added that no hearing may be held until at least 25 days after receipt by the Department of the Interior. Is there a way that we can change the language so that hearings could be held prior to the 25th day in the latter situation? For example, Interior is noticed on February 1, they notify the tribe within 2 days. So, under ICWA, the hearing could happen on February 13 rather than having to wait until February 25. The affected language can be found at:

Section	Page	Line
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112	69	17
123	73	15
129	75	12
146	80	10
190	98	7
210	105	8
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324	147	24
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Section	Page	Line(s)	Comment		
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			339	155	22
			357	163	23
			359	165	10
			364	167	14

ACTIVE EFFORTS
Wisconsin v. Minnesota

Wisconsin/Iowa	Minnesota	To Think About
Intro: The court may not order an Indian child to be placed in an out-of-home care placement or order an involuntary termination of parental rights to an Indian child unless the evidence of active efforts . . . shows that there has been a vigorous and concerted level of case work beyond the level that typically constitutes reasonable efforts . . . or an earnest and conscientious effort . . . The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, and other individual Indian caregivers. The court's *or jury's* consideration of whether active efforts were made . . . shall include whether all of the following activities were conducted:	**Intro:** Active efforts are required throughout the local social service agency's involvement with the family. The parties to this agreement identify the following as potential active efforts: (= reasonable efforts done actively)	**Intro:** The court may not order an Indian child to be placed in an out-of-home care placement or order an involuntary termination of parental rights to an Indian child unless the evidence of active efforts . . . shows that there has been an ongoing, vigorous, and concerted level of case work reflective of the needs of the child and his or her family and the culture of the Indian child's family and tribe. The court's *or jury's* consideration of whether active efforts were made . . . shall include whether (all of) the following activities were conducted:
1. ~~The Indian child's tribe~~ was ~~requested to~~ convene traditional and customary support, actions, and services ~~to resolve~~ the Indian ~~family's issues~~ (= reasonable efforts plus)	2. Requesting the ~~tribally~~ designated representative(s) with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the tribal community, to evaluate the family circumstances and assist in developing a case plan that uses tribal and Indian community resources. 5. Consulting with the tribe(s) about the availability of tribal support for the family, , including traditional and customary practices as well as other existing tribal services, and using	Requesting the tribally designated representative(s) with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the tribal community to evaluate the family circumstances and assist in developing a case plan that uses tribal and Indian community resources.

	these tribally based family preservation and reunification services whenever available. If no tribally based services are available, referring parent(s), Indian custodian(s), and children to other Indian agencies for services.	
2. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the ~~earliest~~ possible point in the proceeding	1. Notifying and requesting the involvement of the tribe(s) or designated tribal representative(s) to ~~participate in the case at the earliest point~~ possible and actively soliciting their advice throughout the case	Identifying, notifying, and inviting designated representatives of the Indian child's tribe to participate in the case at the earliest point possible and actively soliciting their advice throughout the case.
3. Extended family members of the Indian child were consulted to identify and provide family structure and support for the Indian child. 5. Contact was made with extended family members of the Indian child to assure cultural connections.	6. Consulting with extended family members for help and guidance, and using them as a resource for the child. If there is difficulty working with the family, seeking assistance from an agency, including tribal social services, with expertise in working with Indian families. 8. Providing services to extended family members to allow them to be considered for placement of the child.	Contacting extended family members regarding their ability and willingness to serve as placement resources for the child. Consulting with extended family members regarding family structure and support for the child.
4. ~~Frequent~~ visitation was made to the Indian child's home.	4. Arranging visitation (including transportation assistance) that will take place, whenever possible, in the hope of the parent(s), Indian custodian(s), other family members, or in some other non-institutional setting, to keep the child in close contact with parent(s), siblings, and other relatives, regardless of their age, and to allow the child and those with whom the child is visiting to have natural and unsupervised interaction whenever consistent with protecting the child's safety. When the child's safety requires supervised visitation, consulting with tribal representative(s) to determine and arrange the most natural setting that can ensure the child's safety.	Arranging for family interaction, as appropriate to the child's safety and permanency plans, including providing assistance to family members to participate in family interactions.
6. All family preservation ~~alternatives~~ *culturally* appropriate to the Indian child's tribe were ~~exhausted~~ employed	7. Using available tribal, other Indian agency, and state resources that exist and that are appropriate for the child and family.	Employing family preservation alternatives culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance were identified, information about those resources was provided to the Indian family and the Indian family was actively assisted in accessing those resources.	3. Providing concrete services and access to both tribal and non-tribal services including, but not limited to, financial assistance, food, housing, health care and transportation when needed. Such services are to be provided in an on-going manner throughout the case to directly assist the family in accessing and engaging in those services.	Providing access to services designed to support the family's ability to meet any return conditions, including, as appropriate, financial assistance, food, housing, health care, and transportation. Identifying and assisting families in accessing services offered by the child's tribe and other agencies.

Only apply to ICWA

Mitchell, 07-28-08

Definitions of "Reservation" and Related Terms

Ch. 48 – Proposed Language in ICWA Bill

48.02(15c) "Reservation" means Indian country, as defined in 18 USC 1151, or any land not covered under that section to which the title is either held by the United States in trust for the benefit of an Indian tribe or individual or held by an Indian tribe or individual, subject to a restriction by the United States against alienation.

Ch. 48 – Background Check Requirements

48.685(1)(br) "Reservation" means land in this state within the boundaries of a reservation of a tribe or within the bureau of Indian affairs service area for the Ho-Chunk Nation.

Ch. 48 – Notice to Tribes for Child Abuse and Neglect

48.981(3)(bm) *Notice of report to Indian tribal agent.* In a county which has wholly or partially within its boundaries a federally recognized Indian reservation or a bureau of Indian affairs service area for the Ho-Chunk tribe, . . .

Ch. 48 – Child Abuse and Neglect Prevention Program

48.983(1)(h) "Reservation" means land in this state within the boundaries of a federally-recognized reservation of an Indian tribe or within the bureau of Indian affairs service area for the Ho-Chunk Nation.

Crimes and Criminal Procedure, 18 USC 1151

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Child Welfare Act

1903(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

Indian Child Protection and Family Violence Prevention Act, 25 USC 3202(9)

"Indian reservation" means any Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, or lands held by incorporated Native groups, regional corporations, or village corporations under the provisions of the Alaska Native Claims Settlement Act (43 USC 1601, et. seq.)"

Indian Gaming Regulation Act, 25 USC 2703(4)

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR ROBERT JAUCH

FROM: Joyce L. Kiel and Anne Sappenfield, Senior Staff Attorneys

RE: Comments on 2007 Senate Bill 572, Relating to Indian Child Welfare

DATE: June 25, 2008

2007 Senate Bill 572, relating to Indian child welfare, was introduced by you, cosponsored by Representatives Musser and Sherman. No action was taken on the bill, and it failed to pass pursuant to 2007 Senate Joint Resolution 1.

The main purpose of the bill is to incorporate the Federal Indian Child Welfare Act (ICWA) into the Children's Code [ch. 48, Stats.] and the Juvenile Justice Code [ch. 938, Stats.].[1] ICWA was enacted in 1978. Congressional findings in ICWA included the following:

> [T]hat an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions. [25 U.S.C. s. 1901 (4).]

The Congressional declaration of policy included the statement that part of the policy behind ICWA was to place Indian children in foster or adoptive homes which will reflect the unique values of Indian culture. [25 U.S.C. s. 1902.]

[1] Since ICWA does not apply to proceedings based on a criminal act, the bill incorporates ICWA provisions in ch. 938 only with respect to: (a) proceedings involving juveniles in need of protection or services (JIPS) based on the following grounds: s. 938.13 (4) (uncontrollable); (6) (habitually truant from school); (6m) (school dropout); and (7) (habitually truant from home), Stats. (hereinafter, "ICWA JIPS grounds"); and (b) a proceeding which may place an Indian juvenile outside his or her home in order to sanction the juvenile for the first violation of a court order imposed in a case involving one of these four ICWA JIPS grounds or of a municipal court order based on violation of a civil law or ordinance.

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In very general terms, ICWA: applies to a "child custody proceeding"[2] involving an Indian child; requires certain notices, findings, and placement preferences in child custody proceedings under certain circumstances; and provides grounds for collateral attack of certain decrees. ICWA provides for tribal court jurisdiction in some circumstances and also provides a process for a tribe to reassume exclusive jurisdiction in child custody proceedings under certain circumstances.[3] In addition, ICWA provides that a foster care placement or TPR case may be transferred from state court to tribal court under certain circumstances and that a tribe may intervene in certain child custody proceedings in state court under certain circumstances.

Because of federal supremacy, ICWA supersedes state law. Accordingly, both chs. 48 and 938 currently provide that ICWA supersedes that respective chapter in a child custody proceeding governed by ICWA. [ss. 48.028 and 938.028, Stats.] This means that it is the responsibility of attorneys, county staff, the courts, child welfare agencies, and others to know and comply with ICWA when ICWA applies, even though state statutes do not explicitly include ICWA's provisions. The bill amends various statutes and repeals and recreates ss. 48.028 and 938.028 to incorporate the provisions of ICWA into state law.

ICWA does not prohibit a state from enacting statutes that provide greater protections for a ***parent or Indian custodian*** than required by ICWA. In fact, ICWA explicitly provides that when a state provides a higher standard of protection of the rights of the parent or Indian custodian of an Indian child than ICWA, a court must apply the higher standard. [25 U.S.C. s. 1921.] The reverse is also true: ICWA requires a state to comply with any higher standards of protection that ICWA provides for the rights of a parent or Indian custodian. [*Id.*]

The provisions of the bill may be divided into three categories:

- Provisions integrating ICWA provisions into current statutes.

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[2] "Child custody proceeding" is defined in ICWA as a "foster home placement," termination of parental rights (TPR), preadoptive placement, or adoptive placement, but the term does not include placement based on a criminal act or a divorce proceeding. Under ICWA, a "foster home placement" is any action removing an Indian child from his or her "parent" (as defined by ICWA) or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. [25 U.S.C. s. 1903 (1).] In Wisconsin, a child could be placed not only in a foster home or treatment foster home, but also in other types of facilities, such as a group home or residential care center. Such a placement is commonly referred to as an out-of-home care placement. As described in this memorandum, the bill defines an "out-of-home care placement" slightly differently than a "foster care placement" under ICWA. Nevertheless, this memorandum generally uses the term "out-of-home care placement," rather than "foster care placement," unless it is important to distinguish between the two terms.

[3] It appears that four federally recognized American Indian tribes or bands (tribes) in Wisconsin have exclusive jurisdiction over child custody proceedings for an Indian child who resides on the reservation of that tribe. The Menominee Indian Tribe of Wisconsin is not subject to Public Law 280 and has exclusive jurisdiction; the Forest County Potawatomi Community, Red Cliff Band of Lake Superior Chippewas, and Lac Courte Oreilles Band of Lake Superior Chippewa Indians are generally subject to Public Law 280 but have gone through the reassumption process under 25 U.S.C. s. 1918 and been approved by the U.S. Secretary of Interior (Interior Secretary) to reassume exclusive jurisdiction over child custody proceedings for such children.

- Provisions interpreting ICWA. For example, while ICWA refers to the testimony of a qualified expert witness, ICWA does not define what constitutes a qualified expert witness; the bill does so. For provisions in this category, ICWA does not require the explicit language in the bill, that is, there was some level of discretion as to how the proposed statute was drafted.

- Provisions different from or not required by ICWA.

This memorandum does not describe provisions in the bill in the first category as the analysis in the bill provides a general overview of the bill. Rather, you have requested a summary of the bill's provisions in the latter two categories, that is: (a) provisions interpreting ICWA; and (b) provisions different from or not required by ICWA. The items in each of these categories are listed in separate sections below.[4] Inclusion of a provision in either category is not intended to imply that the provision is or is not good public policy. Also, even though a provision in the bill is not required by ICWA, the provision may serve to promote the goals of ICWA, for example, by facilitating a more integrated approach between tribal and county staff involved in a case. Also, in at least one case, a provision not required by ICWA provides a technical correction to current statutes.

In addition, when reviewing the bill, various drafting issues were noted and are listed below under a third section entitled "Technical Comments."

Unless otherwise noted, references to statutory section numbers in this memorandum are references to proposed statutory section numbers in the bill.[5] References to page and line numbers are references to page and line numbers in the bill.

One of the documents cited frequently below is the "Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings" (hereinafter referred to as the "BIA Guidelines"). The BIA Guidelines were issued in the Federal Register on November 26, 1979. [44 Fed. Reg. 67584 (1979).] According to the introduction to the BIA Guidelines, the guidelines were not promulgated as federal regulations because federal regulations have the force of law--whereas, according to the BIA, the primary responsibility for interpreting most provisions of ICWA lies with the courts, and Congress did not intend the BIA to legislate for the courts with respect to child custody proceedings. However, as discussed below, court decisions occasionally refer to the BIA Guidelines.

PROVISIONS INTERPRETING ICWA

This section of the memorandum discusses five provisions of the bill that interpret provisions of ICWA. For each provision, the memorandum describes the provision of ICWA interpreted; describes the relevant provisions of the bill; and provides comments on the bill's interpretation, such as whether

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[4] Because of the complexity of ICWA and the bill, it is possible that not all such provisions in the bill have been identified and included.

[5] In contrast, references to current statutes are typically distinguished by referring to "Stats." following the statutory citation.

the interpretation is similar to or differs from suggestions for implementation or interpretation of ICWA contained in the BIA Guidelines.

1. Good Cause for Not Transferring Proceeding

ICWA

ICWA provides that, absent objection by either parent, a state court must transfer a proceeding for foster care placement or TPR involving an Indian child who is not domiciled or residing on the reservation of the child's tribe to the jurisdiction of the tribe upon the petition of: (a) either of the Indian child's parents; (b) the child's Indian custodian; or (c) the Indian child's tribe--in the absence of "good cause" to the contrary, unless the tribe declines jurisdiction. [25 U.S.C. s. 1911 (b).] ICWA does not define "good cause" for this purpose.

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The bill specifies the circumstances that must exist for a state court to find "good cause" not to transfer the case to the jurisdiction of the tribe. Under the bill, the court may determine that good cause exists to deny the transfer only if the person opposing the transfer[6] shows to the satisfaction of the court any of the following:

- That the Indian child is 12 years of age or over and objects to the transfer.

- That the evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or witnesses and that the tribal court is unable to mitigate the hardship by making arrangements to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.

The bill also provides that a state court cannot transfer jurisdiction if the tribe does not have a tribal court.

[ss. 48.028 (3) (c) 2. and 3. and 938.028 (3) (c) 2. and 3.]

Comments

Under the BIA Guidelines, good cause not to transfer the proceeding may exist if any of the following conditions exists:

- The tribe does not have a tribal court to which the case can be transferred.

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[6] This refers to a person other than one of the child's parents, either of whom may object to the transfer.

- The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

- The Indian child is 12 years of age or over and objects to the transfer.

- The evidence necessary to decide the case cannot be adequately presented in the tribal court without undue hardship to the parties or witnesses.

- The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

The BIA Guidelines specify that socio-economic conditions and the perceived adequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists. [BIA Guidelines at C. 3.]

The BIA Guidelines provide that "good cause" ***may exist*** under the circumstances listed in the Guidelines. The bill, on the other hand, provides an exclusive list of what may constitute "good cause."

The issue of "good cause" has arisen in Wisconsin cases. The Court of Appeals of Wisconsin has held that transferring a case to the tribal court is discretionary and not mandatory, as indicated by the "good cause" exception. In one case, the court of appeals stated: "this court is satisfied that the 'good cause' exception in [ICWA at] 25 U.S.C. 1911 (b) by its nature demonstrates that the transfer is discretionary and not mandatory." [*In the Interest of Cody S.*, 2000 WI App 421 ¶17, 238 Wis. 2d 842, 618 N.W.2d 274.] Regarding use of the BIA Guidelines, in another case, the Wisconsin Court of Appeals found that: "The guidelines, as well as case law interpreting [ICWA at] 25 U.S.C. s. 1911 (b), will provide a framework for the circuit court's good cause analysis." [*In the Interest of Shawnda G.*, 2001 WI App 194 ¶17, 247 Wis. 2d 158, 634 N.W.2d 140.] Therefore, it appears that, unless the statutes are amended to provide otherwise, the court of appeals' holdings require circuit courts to use their discretion, using the BIA Guidelines and any applicable case law as a framework, in determining whether there is good cause not to transfer a case to the tribal court. Under the bill, the court will have little discretion in determining whether there is good cause not to transfer a case to the tribal court.

2. Active Efforts

ICWA

ICWA provides that any party seeking a foster home placement or TPR must satisfy the court that "active efforts" have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these active efforts have proved unsuccessful. [25 U.S.C. s. 1912 (d).] However, ICWA does not define what these active efforts must consist of and does not specify the standard of proof that a court is to apply to determine whether these active efforts have been made.

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Under the bill, before the court may order an out-of-home care placement, the court or jury must find ***by clear and convincing evidence*** that active efforts have been made to provide remedial services

and rehabilitation programs designed to prevent the breakup of the Indian family and that those efforts have been unsuccessful.[7] Before the court may order an involuntary TPR, the court or jury must find ***beyond a reasonable doubt*** that such active efforts were made. [ss. 48.028 (4) (d) 2. and (e) 2. and 938.028 (4) (d) 2.]

The bill further provides that the court may not order an Indian child to be placed in an out-of-home care placement or order an involuntary TPR to an Indian child unless the evidence of active efforts shows that: (a) there has been a vigorous and concerted level of case work beyond the level that typically constitutes reasonable efforts under the Children's Code or the Juvenile Justice Code; or (b) for the Children's Code only, that there has been an earnest and conscientious effort to take good faith steps to provide court-ordered services that takes into consideration the characteristics of the parent or child, the level of cooperation of the parent, and other relevant circumstances in the case. (It is not clear whether items (a) and (b) are intended to apply to out-of-home care placements and involuntary TPRs, respectively, or whether the intent is to apply either to either proceeding.)

Under the bill, active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, and other individual Indian caregivers.

The court's determination as to whether "active efforts" were made must include whether all of the following activities were conducted:

- The Indian child's tribe was requested to convene traditional and customary support, actions, and services to resolve the Indian family's issues.
- Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding.
- Extended family members of the Indian child were consulted to identify and provide family structure and support for the Indian child.
- Frequent visitation was made to the Indian child's home.
- Contact was made with extended family members of the Indian child to assure appropriate cultural connections.
- All family preservation alternatives appropriate to the Indian child's tribe were exhausted.
- Community resources offering housing, financial, and transportation assistance were identified, information about those resources was provided to the Indian family, and the Indian family was actively assisted in accessing those resources.

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[7] In an ICWA JIPS proceeding, the court, but not a jury, must make this finding as there is no right to a jury trial in a JIPS care.

[ss. 48.028 (4) (g) and 938.028 (4) (f).]

Comments

The following comments apply to the interpretation of the provision of active efforts under the bill:

1. The bill is consistent with ICWA by requiring that any party seeking a foster home placement or TPR must satisfy the court that "active efforts" have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these active efforts have proved unsuccessful. In addition, as under the BIA Guidelines, the active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, and other individual Indian caregivers. [BIA Guidelines at D. 2.]

2. As noted above, ICWA does not specify what may constitute "active efforts." The list of the activities to be considered in determining whether active efforts were made, above, is not required by ICWA or included in the BIA Guidelines.

3. The bill requires the court or jury (or court only in an ICWA JIPS proceeding) to find by clear and convincing evidence before ordering an out-of-home care placement or beyond a reasonable doubt before an involuntary TPR is ordered that active efforts have been made to provide remedial services and rehabilitation programs. Again, ICWA provides that a party seeking a foster care placement or TPR must satisfy the court that such active efforts have been made, but does not specify the level of the burden of proof. The Wisconsin Supreme Court has held that while ICWA requires a showing that the damage from continued custody (discussed below) must be supported by evidence beyond a reasonable doubt in an involuntary TPR, ICWA does not require that other issues in an involuntary TPR case be supported by evidence beyond a reasonable doubt. According to the court, there can be dual burdens of proof. [*In re the Interest of D.S.P.*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992).]

4. ICWA provides that any party seeking a foster care placement or TPR must show that active efforts have been made. ICWA does not clearly require that a finding or showing about active efforts again be made before a placement is changed or a dispositional order is extended or when a permanency plan is reviewed. However, the bill requires such a showing at these subsequent proceedings. [ss. 48.357 (1) (c) 1m., 48.365 (2g) (b) 4. and (2m) (a) 1. and 1m., 48.38 (5) (c) 8., 938.357 (1) (c) 1m., 938.365 (2g) (b) 4. and (2m) (a) 1. and 1m., and 938.38 (5) (c) 8.] Moreover, these provisions in the bill also again require a showing that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This may be appropriate for a change in placement of an Indian child under s. 48.357 or 938.357 from his or her home to an out-of-home care placement but does not appear to be required by ICWA in other circumstances.

5. ICWA does not specify who must have made the active efforts. ICWA requires only a finding that they have been made. The bill, however, does contain provisions specifying who must have made active efforts. For example, a CHIPS, an unborn child in need of protection or services (UCHIPS), or an ICWA JIPS petition must include information showing that the person who took the

child, expectant mother, or juvenile into custody and the intake worker have made active efforts. [ss. 48.255 (1) (g) and (1m) (g) and 938.255 (1) (g).] Other provisions relating to court orders under the Children's and Juvenile Justice Codes, requests for a change in placement for a child or juvenile, and extensions of juvenile court orders refer to the person or agency or to the county department or agency primarily responsible for providing services to the child or to the agency primarily responsible for implementing the dispositional order having made the active efforts. [ss. 48.33 (4) (d), 48.355 (2) (b) 6v. and (2d) (d), 48.357 (1) (c) 1m., 48.365 (2m) (a) 1., 938.33 (4) (d), 938.355 (2) (b) 6v. and (2d) (d), 938.357 (1) (c) 1m., and 938.365 (2m) (a) 1.]

3. Qualified Expert Witness

ICWA

Under ICWA, no foster care placement or TPR may be ordered in the absence of a determination that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This determination must be supported by evidence which includes testimony of qualified expert witnesses. [25 U.S.C. s. 1912 (e) and (f).] However, ICWA does not define "qualified expert witness."

The BIA Guidelines provide that removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child. The BIA Guidelines further provide that persons with the following characteristics are most likely to meet the requirements for a qualified expert witness:

- A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

- Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

- A professional person having substantial education and experience in the area of his or her specialty.

[BIA Guidelines at D. 4.]

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The bill provides that a qualified expert witness is defined as follows and must be chosen in the following order of preference:

- A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.

- A member of another tribe who is knowledgeable regarding the customs of the Indian child's tribe relating to family organization or child-rearing practices.

- A professional person having substantial education and experience in the person's professional specialty and having extensive knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organization and child-rearing practices.

- A layperson having substantial experience in the delivery of child and family services to Indians and substantial knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.

[ss. 48.028 (1) (g) and (4) (f) and 938.028 (2) (d) and (4) (e).]

Comments

As noted above, ICWA does not define or specify who may be a qualified expert witness. The BIA Guidelines provide a list of the types of persons most likely to meet the requirements to be a qualified expert witness but do not specify any order of preference among the categories. The bill, on the other hand, lists the types of witnesses that may be chosen and specifies the order in which they must be chosen. The bill does not, however, specify who chooses or provide guidance regarding the circumstances under which the court may consider the testimony of a person who does not meet the qualifications for higher orders of preference.

In a case in which the Wisconsin Supreme Court reviewed whether witnesses in an Indian child custody case were "qualified expert witnesses," the Court noted that the BIA Guidelines are not binding upon courts but found "that they are helpful and should be considered when deciding whether a witness is a qualified expert witness under the ICWA." [*In re the Interest of D.S.P.*, 166 Wis. 2d 464, 477, 480 N.W.2d 234, 240 (1992).]

4. Good Cause to the Contrary in Placement Preferences

ICWA

ICWA sets forth placements which must be given preference when placing an Indian child in an adoptive placement or in a foster care or preadoptive placement in the absence of good cause to the contrary, unless the tribe has adopted a resolution establishing a different order of preference. ICWA also provides that, "where appropriate," the preference of the child or parent must be considered and that, when a consenting parent evidences a desire for anonymity, weight must be given to this desire in applying the preferences. [25 U.S.C. s. 1915.] ICWA does not define what may constitute good cause to not follow the placement preferences.

The BIA Guidelines provide that a determination of good cause not to follow the preferences and the order of preference set forth in ICWA for placements must be based on one or more of the following considerations:

- The request of the biological parents or the child when the child is of sufficient age.

- The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

- The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

[BIA Guidelines at F. 3.]

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The bill contains placement preferences and provides for a tribal resolution adopting a different preference. In addition, "when appropriate," the preference of the child or parent must be considered and, when a parent has consented to the placement evidences a desire for anonymity, the desire must be given "weight" in determining the placement. [ss. 48.028 (7) (a) to (e) and 938.028 (6) (a) and (b).]

The bill provides that whether there is good cause to depart from the order of placement preference must be determined based on any one or more of the following considerations:

- When appropriate, the request of the Indian child's parent or, if the Indian child is of sufficient age and developmental level to make an informed decision, the Indian child, unless the request is made for the purpose of avoiding the application of ICWA.

- Any extraordinary physical, mental, or emotional health needs of the Indian child requiring highly specialized treatment services as established by the testimony of an expert witness, including a qualified expert witness. The length of time that an Indian child has been in a placement does not, in itself, constitute an extraordinary emotional health need.

- The unavailability of a suitable placement for the Indian child after active efforts, as described above, have been made to place the Indian child in the order of preference.

[ss. 48.028 (7) (e) and 938.028 (6) (d).]

Comments

The following comments apply to the first good cause item:

- In the provisions relating to foster care placements, ICWA contains a general statement that, where appropriate, the preference of the Indian child or parent must be considered. In addition, under ICWA, where a consenting parent evidences a desire for anonymity, the court or agency must give weight to such desire in applying preferences. The bill includes these provisions in ss. 48.028 (7) (c) and 938.028 (6) (b). In a separate provision, the bill incorporates the language relating to considering the preference of an Indian child or parent, when appropriate into the first good cause item. At least one commentator has proposed this interpretation. [See Corbine, Sheila D., *Indian Child Welfare Act: A Manual for Wisconsin Practitioners*, Wisconsin Judicare, 1995.] However, ICWA does not appear to include consideration of the parent's or child's preference in the good cause exception. Thus, the

relationship between the two separate provisions in the bill about the parent's or child's preference (only one of which is qualified by a desire to avoid ICWA) is unclear.

- The bill permits the consideration of the Indian child's parent's or the child's request, ***unless the request is made for the purpose of avoiding the application of ICWA***. This provision appears to relate to a holding in a U.S. Supreme Court case that Indian parents cannot circumvent the requirements of ICWA by leaving their reservation to give birth to a child. In the case, the Court stated, "Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish." [*Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 at 51, 109 S.Ct. 1597 (1989).] Because this holding did not relate specifically to placement preferences, it is not clear that the language relating to requests being made for the purpose of avoiding the application of ICWA is required in codifying ICWA.

- The bill adds a reference to the Indian child's developmental level in addition to his or her age, as suggested in the BIA Guidelines, in determining whether to consider an Indian child's request to deviate from the placement preferences.

- There is a recent Supreme Court of Iowa case in which the issue of good cause not to transfer a case based upon the parent's request was raised. Under Iowa statutes, consideration of an Indian child's or parent's preference or a parent's request of anonymity may not be a basis for deviating from the placement preference order unless there is clear and convincing evidence that placement within the order of preference would be harmful to the Indian child. The Supreme Court of Iowa held that the burden of proof required by the Iowa statutes to deviate from the preference order was too high and violated substantive due process. In so holding, the Court cited a parent's fundamental right to make decisions regarding his or her child. In addition, the Court discussed a provision in ICWA instructing courts to determine whether to apply state or federal law based upon which law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, not which provides a higher standard of protection for the tribe. The Court stated: "While providing additional rights to the tribe is the prerogative of the State, those rights may not come at the expense of the parent's or child's rights." [*In the Interest of N.N.E.*, 2008 Iowa Sup. LEXIS 85, at *14 to 16.] (This decision is not binding precedent in Wisconsin.)

The following comments apply to the second good cause item:

- The BIA Guidelines suggest consideration of the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. In the commentary relating to the guidelines, this criterion is described as follows: "In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live." [BIA Guidelines, Commentary for F. 3.] The bill requires the court to consider any extraordinary ***physical, mental, or emotional health needs*** of the Indian child requiring highly specialized treatment services as established by the testimony of an expert witness, including a qualified expert witness. The bill adds mental health needs to what the BIA Guidelines suggest and qualifies physical and emotional

needs by requiring a showing of physical health or emotional health needs. This appears to be a higher threshold than set forth in the BIA Guidelines.

- The bill adds a provision that the length of time that an Indian child has been in a placement does not, in itself, constitute an extraordinary emotional health need.

The following comment applies to the third good cause item:

- The bill permits the court to consider the unavailability of a suitable placement for the Indian child after active efforts have been made to place the Indian child in the order of preference. The BIA Guidelines suggest considering the unavailability of a suitable family after a diligent search, instead of considering whether active efforts have been made. The commentary to the BIA Guidelines states: "A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listing of available Indian homes and contact with nationally known Indian programs with available placement resources." [BIA Guidelines, Commentary for F. 3.] In contrast, the bill cross-references the extensive "active efforts" provisions noted above.

5. Existing Family Doctrine

ICWA

ICWA has no explicit provision regarding whether an Indian child must be part of an existing Indian family before ICWA applies.

Senate Bill 572

The bill provides that ICWA and the provisions of the bill relating to Indian child custody proceedings apply to any Indian child custody proceeding regardless of whether the Indian child is in the legal custody or physical custody of an Indian parent, Indian custodian, extended family member, or other person at the commencement of the proceeding and whether the Indian child resides or is domiciled on or off of a reservation. In addition, the bill provides that a juvenile court may not determine whether ICWA and the provisions of the bill relating to Indian child custody proceedings apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family. [ss. 48.028 (3) (a) and 938.028 (3) (a).]

Comments

The provision of the bill, described above, is in response to several states' court holdings that apply the "existing Indian family doctrine." This doctrine limits the applicability of ICWA because it holds that ICWA does not apply to an Indian child or an Indian child's parents who are not socially or culturally connected with an Indian community. [See, e.g., *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507, 522 (1996).] In other words, under the doctrine, ICWA applies only to proceedings that affect an existing Indian family which is a family that has a relationship with the tribe that goes beyond eligibility for or membership in the tribe. The existing family doctrine has been criticized as undermining congressional intent with respect to ICWA, and some states have adopted legislation

prohibiting the use of the existing family doctrine. [See *Cohen's Handbook of Federal Indian Law*, 2005 Ed., s. 11.07.]

This issue has not been decided by Wisconsin courts and ICWA does not answer the question as to whether Congress intended ICWA to apply to all Indian families or to those with a stronger connection to a tribe.

PROVISIONS DIFFERENT FROM OR NOT REQUIRED BY ICWA

This section of the memorandum lists provisions in the bill that are different from or not required by ICWA.

1. ***Administrative Rule-Making.*** Section 48.028 (11) requires the Department of Children and Families (DCF) and s. 938.028 (9) requires the Department of Corrections (DOC) to promulgate administrative rules to implement and administer ss. 48.028 and 938.028, respectively, and ICWA. Any such rule will have the force of law. It is unclear at this point what the rules will include. If either DCF or DOC interprets its authority broadly, then a rule relating to, but not required by, ICWA may be promulgated.

2. ***Definition of "Relative."*** Section 48.02 (15) amends the definition of "relative" used in ch. 48 by expanding it to include, in the case of an Indian child, an "extended family member" as defined in s. 48.028 (2) (am), which could include, in pertinent part, a person defined as a member of an Indian child's extended family by the law or custom of the Indian child's tribe.

The defined term "relative" is currently used 116 times in ch. 48. This amended definition will affect all provisions that use the defined term, even those provisions that are not directly controlled by ICWA. For example, the bill will redefine who is a relative for purposes of the kinship care and long-term kinship care program statutes.

A similar comment applies to the amended definition of "relative" in s. 938.02 (15), which applies in ch. 938 and will affect references to "relative" in all provisions of ch. 938 (currently there are 42 uses of the term in ch. 938), including those that relate exclusively to delinquency or JIPS based on grounds set forth in s. 938.13 (12) and (14), Stats., which are not covered by ICWA.

3. ***Definitions of "Foster Care Placement" and "Out-of-Home Care Placement."*** Under ICWA, four types of proceedings are defined as a "child custody proceeding." [25 U.S.C. s. 1903 (1).] One of those is a "foster care placement," which is defined as an action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.

Sections 48.028 (2) (e) and 938.028 (2) (c) define an "out-of-home care placement" in essentially the same language but do not specify that the definition is limited to situations in which parental rights have not been terminated.

4. ***Notice.*** ICWA provides that in any ***involuntary*** proceeding in state court when the court knows or has reason to know that an Indian child is involved, the party seeking the ***foster care placement or TPR*** must notify the Indian child's parent or Indian custodian and the Indian child's tribe of the

pending proceedings and of their right of intervention. ICWA requires that the notice be sent by "registered mail with return receipt requested." ICWA further provides that if the identity or location of the parent or Indian custodian and the tribe cannot be determined, the notice must be given to the Interior Secretary in the same manner and the Interior Secretary then has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe. Under ICWA, no foster care placement or TPR proceeding may be held until at least 10 days after receipt of the notice by the parent or Indian custodian and the tribe or by the Interior Secretary. Moreover, the parent, Indian custodian, or tribe must, upon request, be granted an additional 20 days to prepare for the proceeding. [25 U.S.C. s. 1912 (a).]

The following comments apply to related provisions in the bill:

a. While ICWA requires registered mail with return receipt requested for notices sent to the parent, Indian custodian, and tribe (or Interior Secretary), the notice sections in the bill require notice by ***certified*** mail, not ***registered*** mail. (See ss. 48.028 (4) (a); 48.273 (1) (ag); 48.299 (9); 48.357 (1) (am) 1m. and (c) 2m. and (2m) (bm); 48.38 (4m) (c), (5) (bm), and (5m) (bm); 48.42 (2g) (ag); 48.43 (5) (bm); 48.831 (1r); 48.977 (4) (c) 2m.; 938.028 (4) (a); 938.273 (1) (ag); 938.299 (10); 938.355 (6) and (6m) (bm); 938.357 (1) (am) 1m. and (c) 2m. and (2m) (bm); and 938.38 (4m) (c), (5) (bm), and (5m) (bm).)

   Moreover, these provisions in the bill do ***not*** specify that a return receipt must be requested (which currently costs an extra $2.15 (or $3.80 if requested after mailing), in addition to the cost of certifying).

   > Comment: The U.S. Postal Service offers both registered mail service and certified mail service--which may be purchased with or without return receipt being provided. It also should be noted that current statutes distinguish between registered and certified mail--with at least 133 references to "registered mail" and at least 233 references to "certified mail."

b. Section 48.028 (4) (a) indicates that "the court" or "party seeking the out-of-home care placement, [TPR], or return of custody" must provide this notice for specified hearings in any involuntary proceeding involving out-of-home care placement, TPR, or return of custody of an Indian child. Section 938.028 (4) (a) includes a comparable provision for proceedings involving the four ICWA JIPS grounds.

   This is in contrast to ICWA, which requires the party seeking the foster care placement or TPR, not the court, to send this notice. The bill does not make clear in what circumstances the court would be responsible for providing this notice instead of the party.

   Also, while a CHIPS or JIPS petition may be filed, many dispositional options are available under the statutes, with out-of-home care placement being only one possible alternative. It may not be clear at the outset (especially if the child or juvenile is not already being held in custody outside the home) that a party will be seeking out-of-home care placement.

c. As noted above, in cases in which notice is provided to the Interior Secretary, ICWA prohibits holding an involuntary foster care placement or TPR proceeding for at least ***10 days*** after receipt of the notice by the Interior Secretary.

However, several provisions in the bill prohibit holding a hearing until 25 days after receipt of the notice by the Interior Secretary. [ss. 48.028 (4) (a) and (8) (a) 2.; 48.299 (9); 48.357 (1) (am) 1m. and (c) 2m. and (2m) (bm); 48.38 (4m) (c), (5) (bm), and (5m) (bm); 48.42 (2g) (ag); 48.423 (1); 48.43 (5) (bm); 48.831 (1r); 48.977 (4) (c) 2m.; 938.028 (4) (d); 938.299 (10); 938.355 (6) (bm) and (6m) (bm); 938.357 (1) (am) 1m. and (c) 2m. and (2m) (bm); and 938.38 (4m) (c), (5) (bm), and (5m) (bm).] In addition, two provisions in the bill require that notice of a hearing be sent to the Interior Secretary at least ***25 days*** before the time of the hearing. [ss. 48.273 (1) (c) 2. and 938.273 (1) (c) 2.]

ICWA is itself confusing regarding when an involuntary proceeding may be held in cases in which the Interior Secretary is notified. First, ICWA states that the proceeding may not be held until at least 10 days after receipt of the notice by the Secretary. Thus, it appears that that ICWA does not prohibit holding an involuntary proceeding any time after the tenth day of the Interior Secretary's receipt, and the BIA Guidelines at B. 6. reflect this literal reading (assuming the tribe or parent or Indian custodian has not received notice in the interim and requested an additional 20 days to prepare).

However, ICWA also provides that the Interior Secretary has 15 days to notify the parent or Indian custodian and tribe; ICWA also refers to not holding a proceeding until at least 10 days after receipt of notice by the parent or Indian custodian and tribe--without clearly distinguishing between notice provided by the party versus notice provided by the Interior Secretary. If the notice to the parent or Indian custodian and tribe were provided by the Interior Secretary, this could take varying lengths of time. For example, if the Interior Secretary took one day to provide it, that would involve: mail time to the Interior Secretary, plus one-day processing, plus mail time from the Interior Secretary to the parent or Indian custodian and tribe, plus 10 days--which could take far less than 25 days after the Interior Secretary received the notice. If the notice to the parent or Indian custodian and tribe were provided by the Interior Secretary and if the Interior Secretary took 15 days to provide it, that would involve: mail time to the Interior Secretary, plus 15-day processing, plus mail time from the Interior Secretary to the parent or Indian custodian and tribe, plus 10 days--which would take more than 25 days after the Interior Secretary received the notice.

Thus, it appears that the bill's provision of 25 days after receipt by the Interior Secretary would sometimes provide more than 10 days of notice to the parent or Indian custodian and tribe and sometimes provide less than 10 days of notice to the parent or Indian custodian and tribe[8] before the hearing is held--a variation on what would have occurred had the party had information sufficient to provide notice directly and a variation on what is required by ICWA.

d. Sections 48.363 (1) (b) (for revision of CHIPS dispositional order proceeding) and 938.363 (1) (b) (for revision of ICWA JIPS dispositional order proceeding) require that notice of a hearing be provided to an Indian child's Indian custodian and tribe. Because such proceedings cannot involve a change in placement, the proceedings technically are not

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[8] However, even if it provided less than 10 days, the parent or Indian custodian or the tribe would be able to request an additional 20 days to prepare for the proceeding.

subject to ICWA as they are not foster care placement or TPR proceedings. Thus, ICWA does not require that notice of the proceeding be provided to an Indian custodian or tribe.

e. Section 48.42 (2g) (ag) requires notice to the Indian child's tribe of a TPR petition, including a voluntary TPR petition. However, according to the BIA Guidelines, ICWA does not require notice to the tribe in cases of voluntary proceedings, including voluntary TPR: "The [ICWA] mandates a tribal right to notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. s. 1912 with 25 U.S.C. s. 1913. For voluntary placements, however, the [ICWA] specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. s. 1915(c)." [BIA Guidelines at B. 1. Commentary.][9] [See also *Cohen's Handbook of Federal Indian Law*, 2005 Ed., s. 11.04 [1], noting that ICWA requires notice to a tribe only in involuntary proceedings, but noting that several states have augmented ICWA by requiring notice to a tribe of voluntary proceedings.]

f. Current s. 48.423 (1), Stats., provides that if a person appears at a TPR hearing claiming to be the father of the child, the court must set a date for a hearing on the issue of paternity. The bill amends this provision to specify that if the child is an Indian child or it appears to the court that a determination of paternity may result in finding that the child is an Indian child, the court must provide notice of the paternity hearing to various persons and the tribe (or the Interior Secretary, as discussed above), and then delay the paternity hearing for 10 or 25 days after notice is received.

   A paternity hearing does not result in an involuntary foster care placement or involuntary TPR. Thus, it does not appear that a paternity hearing is subject to the requirement in 25 U.S.C. s. 1912 (a) of ICWA to provide notice to an Indian custodian or the tribe (or the Interior Secretary) and then delay the proceeding for certain periods of time after notice is received.

g. Sections 48.38 (4m) (c), (5) (bm), and (5m) (bm) and 938.38 (4m) (c), (5) (bm), and (5m) (bm) provide for notice to an Indian custodian and the tribe of permanency plan review hearings. These hearings themselves do not result in an out-of-home care placement or change in placement. Thus, it does not appear that these hearings are subject to the requirement in 25 U.S.C. s. 1912 (a) of ICWA to provide notice to an Indian custodian or the tribe (or the Interior Secretary) and then delay the proceeding for certain periods of time after notice is received.

   If these provisions are retained in the bill, appropriate cross-references should be included about the potential delay. As one example, s. 48.38 (4m) (a) should cross-reference the exception in s. 48.38 (4m) (c) regarding when a hearing may be held.

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[9] In *Catholic Social Services v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), cert. denied sub nom. *Cook Inlet Tribal Council v. Catholic Social Services*, 495 U.S. 948 (1990), the Alaska Supreme Court held that, based on the legislative history, Congress explicitly granted notice and intervention rights in involuntary TPR proceedings but did not do so in voluntary TPR proceedings and a tribe was not entitled to notice of a voluntary TPR proceeding. (That decision is not binding precedent in Wisconsin.)

h. Section 48.028 (4) (a) requires notice to a "former parent" and "former Indian custodian" of various hearings for out-of-home care placements, TPR, and return of custody and prohibits holding hearings until at least 10 days after its receipt (or 25 days after receipt by the Interior Secretary). Read literally, this would mean that if there had been a TPR of a parent years ago, any subsequent proceeding enumerated (for example a CHIPS proceeding) in the future would still require notice to this former parent and would require notice to any former Indian custodian. It appears that the reference to the former parent and former Indian custodian may have been intended to apply only to return of custody proceedings under s. 48.028 (8) (a). If that is the case, s. 48.028 (4) (a) should be revised to make this clear.

5. ***Right to Counsel.*** ICWA provides that in any removal, placement, or TPR proceeding in which the court determines indigency, the parent or Indian custodian has the right to court-appointed counsel. ICWA also provides that the court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interests of the child. However, ICWA provides that if state law makes no provision for the appointment of counsel in these proceedings, the court must promptly notify the Interior Secretary upon appointment of counsel, and the Interior Secretary, upon certification of the presiding judge, must pay reasonable fees and expenses out of funds appropriated for this purpose. [25 U.S.C. s. 1912 (b).]

Thus, ICWA does not require a state to provide or pay for counsel. Moreover, the provision in ICWA regarding appointment of counsel for a parent or Indian custodian in any removal, placement, or TPR proceeding has been interpreted as applying only to removal, TPR, and placement proceedings that are involuntary, [see *Cohen's Handbook of Federal Indian Law*, 2005 Ed., s. 11.04 [2]], although the language of ICWA is not clear on this point.

Current statutes relating to appointment of counsel or a guardian ad litem (GAL) for a child who is the subject of a proceeding under ch. 48 or 938 are unchanged by the bill. Current statutes generally provide that a child cannot be placed outside the home unless represented by counsel (or a GAL if under 12).)[10] Thus, current law, which is unaffected by the bill, is more generous than required by ICWA with respect to appointment of counsel for an Indian child.

Section 48.028 (4) (b) provides that, whenever an Indian child is the subject of proceedings involving removal from home, out-of-home care placement, or TPR, the Indian child's parent or Indian custodian has the right to be represented by court-appointed counsel as provided in s. 48.23 (2g). Section 48.23 (2g) then indicates that the parent or Indian custodian has the right to be represented by court-appointed counsel as provided in s. 48.23 (4). Section 48.23 (4) then is amended to include a cross-reference to s. 48.23 (2g), but only with respect to a parent who is an adult. (Sections 48.20 (8) (a), 48.21 (3) (d), and 48.27 (4) (a) 2. require notice to the parent and Indian custodian of this right.) Sections 938.028 (4) (b) and 938.23 (2g) and (4) include similar provisions for proceedings involving the four ICWA JIPS grounds. Although ICWA does not require a state to provide or pay for counsel, provisions relating to appointment of counsel for a parent or Indian custodian are as follows:

a. Minor Parent--Involuntary TPR and Contested Adoption. Current s. 48.23 (2), Stats., provides that any parent under 18 years of age whose child is involved in an involuntary

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[10] A child may be able to waive counsel under certain circumstances.

TPR or contested adoption must be represented by counsel. Current s. 48.23 (4), Stats., then provides that the state public defender appoints an attorney without a determination of indigency. Thus, current law, which is unaffected by the bill, is more generous than required by ICWA.

From a drafting standpoint, it appears that s. 48.23 (2g) should cross-reference this provision in current s. 48.23 (2), Stats.

b. Adult Parent--Involuntary TPR and Contested Adoption. Current s. 48.23 (2), Stats., provides that any parent 18 years of age or over whose child is involved in an involuntary TPR or contested adoption must be represented by counsel unless the parent waives counsel. Current s. 48.23 (4), Stats., then provides that if it appears that the parent is unable to afford counsel in full or the parent so indicates, the court must refer the parent for indigency determinations. An indigent or partially indigent adult parent is provided counsel (although some reimbursement may be required). Thus, this part of current law, which is unaffected by the bill, provides representation when it would be required by ICWA (even though ICWA does not require that the state be the entity providing the counsel).

From a drafting standpoint, the bill creates s. 48.23 (2g) which, in part, provides that if an adult whose child is an Indian child is the subject of a TPR proceeding (including an involuntary TPR), the parent has the right to be represented by counsel as provided in s. 48.23 (4). While consistent with current law, it appears that this part of s. 48.23 (2g) is superfluous.

c. Minor Parent--Voluntary TPR. Current s. 48.23 (2), Stats., provides that a minor parent in a voluntary TPR proceeding must be represented by a GAL. The bill amends s. 48.23 (2) and (4) and creates s. 48.23 (2g) to delete the requirement for a GAL and instead (by reference to s. 48.23 (4)) requires the minor parent to be represented by counsel without a determination of indigency.

d. Adult Parent--Voluntary TPR. Other than in a CHIPS proceeding, current s. 48.23 (3), Stats., authorizes the court to appoint counsel for any party in any case, which could include an adult parent in a voluntary TPR, unless the party chooses to retain his or her own counsel. Thus, current law authorizes, but does not require, the court to appoint counsel for an adult parent in a voluntary TPR. Current s. 48.23 (4), Stats., provides that if the court appoints counsel, the court may order reimbursement in any manner suitable to the court regardless of the person's ability to pay. These provisions are unaffected by the bill.

However, the bill creates s. 48.23 (2g) which, in part, provides that if an adult whose child is an Indian child is the subject of a TPR proceeding (including a voluntary TPR), the parent has the right to be represented by counsel as provided in s. 48.23 (4). This could affect indigent and nonindigent adult parents as follows:

- *Indigent.* The bill amends s. 48.23 (4) to provide that, in a situation described in s. 48.23 (2g) involving an adult parent, if it appears that the parent is unable

to afford counsel in full or the parent so indicates, the court must refer the parent for indigency determinations. An indigent or partially indigent adult parent is provided counsel (although some reimbursement may be required).

- *Nonindigent.* Another part of current s. 48.23 (4), Stats., which is not amended by the bill, specifies that in other situations when a person has a right to be represented by counsel, counsel must be provided and reimbursed in any manner suitable to the court regardless of the person's ability to pay. The language in s. 48.23 (2g) referring to the right to be represented by court-appointed counsel as provided in s. 48.23 (4) appears to apply to this situation and apparently would include an adult parent who does not appear to indigent.

e. Minor Parent--CHIPS or ICWA JIPS Proceeding. Current ss. 48.23 (3) and 938.23 (3), Stats., provide that the court may not appoint counsel for any party other than a child in a CHIPS or JIPS proceeding.[11]

For a minor parent whose Indian child is the subject of a CHIPS or ICWA JIPS[12] proceeding, ss. 48.23 (2g) and 938.23 (2g) provide for the appointment of counsel for that parent as provided in ss. 48.23 (4) and 938.23 (4), respectively--at least to the extent that the child is removed from his or her home or placed in an out-of-home care placement. (This would likely apply in some, but not all CHIPS or ICWA JIPS cases.[13]) For a minor parent, ss. 48.23 (4) and 938.23 (4) would then require the minor parent to be represented by counsel without a determination of indigency.

From a drafting standpoint, a cross-reference in the last sentence of current ss. 48.23 (3) and 938.23 (3), Stats., to proposed ss. 48.23 (2g) and 938.23 (2g), respectively, is needed to clearly provide an exception to the prohibition against appointing counsel for parents in a CHIPS or ICWA JIPS proceeding involving an Indian child under certain circumstances.

f. Adult Parent--CHIPS or ICWA JIPS Proceeding. Current ss. 48.23 (3) and 938.23 (3), Stats., provide that the court may not appoint counsel for any party other than a child in a CHIPS or JIPS proceeding. Again, this provision was held unconstitutional in *Joni B.* in CHIPS proceedings under certain circumstances.

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[11] In *Joni B. v. State*, 202 Wis. 2d. 1, 549 N.W.2d 411 (1996), the Wisconsin Supreme Court held that, based on various factors which should be considered by a court (such as a particular person's capabilities), under certain circumstances, it is unconstitutional not to appoint counsel for a parent in a CHIPS proceeding.

[12] Given the grounds for ICWA JIPS jurisdiction, it is likely impossible for a juvenile adjudicated JIPS under any of the ICWA JIPS grounds to have a minor parent.

[13] Sections 48.23 (2g) and 938.23 (2g) do not apply to all CHIPS or ICWA JIPS cases, but rather just the cases involving removal from the home or placement in an out-of-home care placement. It may be difficult to determine at the outset which cases those are.

For an adult parent whose Indian child is the subject of a CHIPS or ICWA JIPS proceeding, ss. 48.23 (2g) and 938.23 (2g) of the bill provide for the appointment of counsel for that parent, as provided in ss. 48.23 (4) and 938.23 (4), respectively--at least to the extent that the child is removed from his or her home or placed in an out-of-home care placement. This could affect indigent and nonindigent adult parents as follows:

- *Indigent.* The bill amends s. 48.23 (4) to provide that, in a situation described in s. 48.23 (2g) involving an adult parent, if it appears that the parent is unable to afford counsel in full or the parent so indicates, the court must refer the parent for indigency determinations. An indigent or partially indigent adult parent is provided counsel (although some reimbursement may be required).

- *Nonindigent.* Another part of current s. 48.23 (4), Stats., which is not amended by the bill, specifies that in other situations when a person has a right to be represented by counsel, counsel must be provided and reimbursed in any manner suitable to the court regardless of the person's ability to pay. The language in s. 48.23 (2g) referring to the right to be represented by court-appointed counsel as provided in s. 48.23 (4) appears to apply to this situation and apparently would include an adult parent who does not appear to indigent.

From a drafting standpoint, a cross-reference in the last sentence of current ss. 48.23 (3) and 938.23 (3), Stats., to ss. 48.23 (2g) and 938.23 (2g), respectively, is needed to clearly provide an exception to the prohibition against appointing counsel for parents in a CHIPS or ICWA JIPS proceeding involving an Indian child under certain circumstances.

g. Minor and Adult Expectant Mother--UCHIPS Proceeding. The bill does not change current s. 48.23 (2m), Stats., which specifies the circumstances under which a minor expectant mother or adult expectant mother is provided counsel in a UCHIPS proceeding.

h. Parent of Minor Expectant Mother--UCHIPS Proceeding. If an Indian child is a minor expectant mother subject to a UCHIPS proceeding, it appears that s. 48.23 (2g), as created by the bill, would provide for the child's parent to be represented by counsel as provided in s. 48.23 (4). The discussion of s. 48.23 (4) under item f., above, would also apply to indigent and nonindigent parents in this situation.

i. Indian Custodian. Sections 48.23 (2g) and 938.23 (2g) provide that whenever an Indian child is the subject of a proceeding involving the removal of the child from his or her home, placement in an out-of-home care placement, or (under s. 48.23 (2g)) is the subject of a TPR, the child's Indian custodian has the right to be represented by court-appointed counsel as provided in ss. 48.23 (4) and 938.23 (4), respectively.

The bill does not amend s. 48.23 (4) or 938.23 (4) with respect to an Indian custodian. Thus, an Indian custodian would come under the provision in current law referring to an other situation in which a person has a right to be represented by counsel under the section, that is, an Indian custodian would be subject to the same provisions as a

nonindigent adult parent discussed in item f., above. That means counsel must be provided and reimbursed in any manner suitable to the court regardless of the Indian custodian's ability to pay.

6. ***Indian Child.*** Several provisions in the bill refer to whether a child "is or may be" an Indian child, for example: s. 48.255 (1) (g) (content of CHIPS petition); s. 48.255 (1m) (g) (content of a UCHIPS petition--with respect to the expectant mother); s. 48.255 (4) (who receives CHIPS and UCHIPS petition--the latter with respect to whether the unborn child may be an Indian child when born); s. 48.273 (1) (c) 2. (who receives UCHIPS notice or service of summons--with respect to whether the unborn child may be an Indian child when born); 48.299 (9) (ch. 48 proceedings); s. 48.315 (1) (j) (continuance for good cause in CHIPS, TPR, or UCHIPS proceeding); s. 48.355 (2) (d) (copy of dispositional order in UCHIPS proceeding--with respect to whether the unborn child may be an Indian child when born); s. 48.427 (6) (b) 4. (information for TPR disposition); s. 928.255 (1) (g) (content of petition for four ICWA JIPS grounds); s. 938.299 (10) (proceedings in four ICWA JIPS grounds); and s. 938.315 (1) (a) 11. (continuance for good cause in four ICWA JIPS proceeding).

However, three provisions in the bill refer to whether the agency "knows or has reason to know" that the child is an Indian child: ss. 48.33 (4) (d) (court reports in CHIPS disposition); 48.42 (2g) (ag) (service of TPR petition in case of either voluntary or involuntary TPR); and 938.33 (4) (d) (court reports in certain JIPS dispositions).

In contrast, ICWA requires that in an involuntary proceeding in state court, where the court "knows or has reason to know" that an Indian child is involved, notice must be provided to the parent or Indian custodian and Indian child's tribe (or Interior Secretary under certain circumstances). [25 U.S.C. s. 1912 (a).] For other provisions, ICWA refers to an Indian child, rather than to a person the court knows or has reason to know is an Indian child.

It appears that the only pertinent provision in the bill that is exactly the same as ICWA in this regard is s. 48.42 (2g) (ag) (service of TPR petition), and then only with respect to an involuntary TPR petition.

The bill provides no guidance as to how a determination is made that a child "may be" an Indian child.

> Comment: The BIA Guidelines provide examples of circumstances in which a state court has reason to believe an Indian child is involved. [BIA Guidelines at B. 1. (c).] In deciding a case as to whether notice was required to be given, the Wisconsin Supreme Court noted that ICWA uses the "reason to know" threshold and noted that the BIA Guidelines are helpful in addressing this issue. [*In re the Termination of Parental Rights to Arianna R.G.*, 2003 WI 11, 259 Wis. 2d 563, 657 N.W.2d 363 (2003).] These examples from the BIA Guidelines are not enumerated in the bill.

7. ***Information in Petition.*** Sections 48.255 (1) (g) and 938.255 (1) (g) provide that, if the child is or may be an Indian child, the CHIPS petition or ICWA JIPS petition, respectively, must include reliable and credible information showing that: (a) continued custody of the child by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and (b) active

efforts have been taken to prevent the breakup of the Indian family and that those efforts have proved unsuccessful.

Under ICWA, the court must be satisfied about active efforts and no foster care placement can be ordered unless there is a determination about the likelihood of damage if there is continued custody by the parent or Indian custodian. However, ICWA does not specify what information or statements must be in a petition. In addition, the following technical comments apply:

a. The sentence which follows this requirement appears to limit the requirement to provide this information to petitions in which the child is being held in custody outside of his or her home, but this is unclear. Thus, there is ambiguity as to if this information is required only in the petition if the child is being held in custody outside the home. If that is the intent, then a drafting approach like current ss. 48.255 (1) (f) and 938.255 (1) (f), Stats., could be used as those provisions make it clear that certain information is required in a petition only if a child is being held in custody outside the home.

b. If the intent is that this information must be included in a CHIPS petition even if the child is not being held in custody outside the home and even if the circumstances of the case likely relate more to a desire to have services provided than to a removal of the child from the parent's custody, it may be difficult to file a petition that meets the requirements of the bill with respect to an Indian child under certain CHIPS grounds. (For example: s. 48.13 (4), Stats., provides grounds for CHIPS jurisdiction if the parent or guardian signs the petition requesting jurisdiction and is unable or needs assistance to care for or to provide necessary special treatment or care; and s. 48.13 (13), Stats., provides grounds for CHIPS jurisdiction based on a child's not having been immunized.)

c. Current s. 48.13 (2m), Stats., provides CHIPS jurisdiction for a parent who has relinquished custody of a newborn under s. 48.195, Stats. It does not appear that such determinations would apply to that situation.

8. ***UCHIPS Jurisdiction.*** Current Wisconsin law provides for court jurisdiction over an unborn child alleged to be in need of protection or services (UCHIPS, as noted above) whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances, or controlled substance analogs exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has jurisdiction over the expectant mother in those situations. [s. 48.133, Stats.] The expectant mother may be held in custody. [s. 48.207, Stats.]

ICWA applies to child custody proceedings. ICWA does not specify that an unborn child is a child for purposes of ICWA. Moreover, ICWA does not apply to custody proceedings involving adults.

It appears that the only way that ICWA would apply to a UCHIPS proceeding is if the expectant mother herself is an Indian child as she may be subject to an out-of-home care placement. Consistent with this, ss. 48.255 (1m) (g) and 48.357 (1) (am) 2. b. refer to whether the expectant mother is (or may be, in the case of the first statute) an Indian child.

Section 48.355 (2) (d) and (4) refers to whether both the expectant mother is an Indian child and also to whether the unborn child, when born, may be an Indian child.

In contrast, most of the other provisions in the bill relating to UCHIPS refer to whether the child, when born, may be an Indian child--without regard to whether the expectant mother is an Indian child. These include the following:

a. Section 48.27 (3) (d) is amended, in pertinent part, to provide that if a UCHIPS petition is filed involving an unborn child who, when born, will be an Indian child, the court must notify the Indian tribe with which the unborn child may be affiliated. This section then provides that the tribe and Indian custodian may intervene at any point in the UCHIPS proceeding. No reference is made to an expectant mother who is an Indian child.

b. Section 48.273 (1) (ag) requires service of summons or notice in a UCHIPS proceeding to the Indian tribe in which an unborn child who may be an Indian child when born may be eligible for affiliation when born. No reference is made to an expectant mother who is an Indian child.

> By the same token, s. 48.273 (1) (c) 2. provides, in pertinent part, that when a UCHIPS petition is filed involving an unborn child who, when born, may be an Indian child and the entity to be notified includes the tribe in which the unborn child may be eligible for membership when born, mail must be sent so that it is received by the tribe or by the Interior Secretary by a certain deadline. Again, such a proceeding does not appear to be subject to ICWA unless the expectant mother is herself an Indian child, but no reference is made to such a person.

c. Section 48.299 (9) refers to whether the unborn child, when born, may be an Indian child and provides for notices and the 10- and 25-day delay provisions set forth in s. 48.30 (6) (a) and (7). No reference is made to an expectant mother who is an Indian child.

d. Section 48.315 (1) (j), in pertinent part, provides for a delay to be requested in a UCHIPS proceeding (not to exceed 20 days), to prepare for a proceeding, based on whether an unborn child, when born, may be an Indian child. No reference is made to an expectant mother who is an Indian child.

9. ***Parental Consent to Abortion.*** ICWA does not include provisions relating to parental consent prior to an abortion or the judicial waiver procedure relating to such.

However, s. 48.315 (1m) is amended to specify that s. 48.315 (1) (fm) (any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing under s. 48.365 due to the child having run away or otherwise having made himself or herself unavailable to receive that notice) does not apply in a proceeding relating to requiring parental consent prior to a judicial waiver procedure relating to abortion under s. 48.375 (7). This is a technical correction of current statutes, but this provision is not related to ICWA.

10. ***Grounds for Involuntary TPR.*** The bill amends s. 48.415 (intro.) to add a requirement for all involuntary TPRs that, in addition to establishing that one of the enumerated grounds for involuntary TPR exists, if services for the child and family or for the unborn child and expectant mother have been ordered by the court, a determination must be made by the court or jury that the agency responsible for the care of the child and family or of the unborn child and expectant mother has made an earnest and conscientious effort to take good faith steps to provide those services that takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother, and other relevant circumstances of the case. Moreover, s. 48.415 (2) (a) 2., which currently includes a similar requirement only to the continuing CHIPS grounds for involuntary TPR, is being repealed. In addition, s. 48.42 (1) (e) is being created to require information about this in all TPR petitions. Section 48.424 (1) (b) then provides that in an involuntary TPR fact-finding hearing, these allegations must be proved in cases in which services were ordered by the court.[14] (Also see s. 48.424 (3).) The following comments apply:

a. ***These changes in the bill apply to all children, not just Indian children.*** In contrast, ICWA applies only to Indian children.

b. Section 48.42 (1) (e) applies to all petitions for TPR for all children, including petitions for voluntary TPR. ICWA does not specify what information must be included in petitions. More importantly, neither the bill nor ICWA requires that findings be made about the matters set forth in s. 48.42 (1) (e) in voluntary TPR proceedings.

c. Even for an Indian child, ICWA does not appear to require that this component of the current ground of continuing CHIPS jurisdiction for involuntary TPR be changed to apply to any, much less all, involuntary TPRs.

11. ***Active Efforts in Voluntary TPR Cases.*** Section 48.42 (1) (f) requires that a TPR petition set forth reliable and credible information about the active efforts issue. This would apply to petitions for voluntary TPR, as well as to petitions for involuntary TPR.

ICWA does not require a determination about this matter in a voluntary TPR proceeding, as acknowledged by the applicability of s. 48.028 (4) (e) only to involuntary TPR proceedings. Therefore, it is not clear why s. 48.42 (1) (f) requires that this information be included in a petition for voluntary TPR.

12. ***Tribal Right of Intervention in Voluntary TPR.*** Section 1911 (c) of ICWA provides, in pertinent part, that in a "foster care placement"[15] or TPR proceeding in state court, the Indian custodian and tribe have a right to intervene. This has been interpreted as applying only to involuntary proceedings, but it has also been interpreted as applying to both voluntary and involuntary

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[14] This is a separate requirement from the provision included in s. 48.415 (intro.) about whether the agency has made active efforts to prevent the breakup of the Indian family as cross-referenced in s. 48.42 (1) (f).

[15] Based on definitions in ICWA at 25 U.S.C. s. 1903 (1), a "foster care placement" does not include adoptive placements or preadoptive placements.

proceedings.[16] Thus, there is some uncertainty as to what ICWA provides with regard to the right of a tribe or Indian custodian to intervene in a voluntary TPR.

Section 48.028 (3) (e) provides a right of intervention for a tribe and Indian custodian in any TPR, including a voluntary TPR.[17]

13. ***Examination of Reports.*** ICWA provides that each "party" to an involuntary foster care placement or involuntary TPR proceeding involving an Indian child has the right to examine all reports or other documents filed with a court upon which any decision with respect to such action may be based. [25 U.S.C. s. 1912 (c).] This ICWA provision does not appear to apply unless a tribe has become a party by intervening in a case.

However, ss. 48.38 (5) (d), 48.43 (5m), 48.63 (4), and 938.38 (5) (d) require a court or agency that prepared the permanency plan to furnish a copy of the original and any revised plan to an Indian child's tribe, even a tribe that has no child welfare department and has not been involved in the case. This does not appear to be required by ICWA unless the tribe has become a "party" in the case.

Also, s. 48.63 (5) (c) and (d) 4. and 6. requires, in pertinent part, that a copy of the initial or revised permanency plan or summary of determinations be submitted to an Indian child's tribe if there is a voluntary agreement for out-of-home care placement. This does not appear to be required by ICWA since voluntary agreements for out-of-home care placements are not defined as "child custody proceedings" under ICWA.

14. ***Definition of "Reservation."*** ICWA defines "reservation" for purposes of ICWA. [25 U.S.C. s. 1903 (10).] Section 48.02 (15c) defines "reservation" in the same manner for all purposes in ch. 48, and s. 938.02 (15c) does so for all purposes in ch. 938.

However, the term "reservation" is used in several sections of chs. 48 and 938 that do not relate to ICWA. For example:

a. Although ICWA does not include provisions relating to reporting of child abuse or neglect, the proposed definition of "reservation" in s. 48.02 (15c) would affect s. 48.981, relating to this matter. Current s. 48.981 (3) (bm), Stats., provides that in a county which has wholly or partially within its boundaries a "federally recognized Indian reservation" or a BIA service area for the Ho-Chunk tribe, a county department that receives a report of suspected child abuse or neglect that pertains to an Indian child who resides in the county must

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[16]See BIA Guidelines: "The [ICWA] mandates a tribal right to notice and intervention in involuntary proceedings but not in voluntary ones." [BIA Guidelines at B. 1. Commentary.] Also see *Catholic Social Services*, in which the Alaska Supreme Court held that, based on the legislative history, Congress explicitly granted intervention rights in involuntary TPR proceedings but did not do so in voluntary TPR proceedings. But see *Cohen's Handbook of Federal Indian Law*, 2005 ed., s. 11.04 [1], stating that the tribe's right to intervene applies in both involuntary and voluntary proceedings.

[17] Section 48.028 (4) (a), in pertinent part, requires notice to a tribe and Indian custodian of a right of intervention in a proceeding involving involuntary out-of-home care placements and involuntary TPRs. This is consistent with 25 U.S.C. s. 1912 (a) of ICWA, which requires notice to a tribe and Indian custodian in the case of an involuntary foster care placement or involuntary TPR.

provide notice to a tribal agent (the particular agent depending on whether the tribe is known or unknown). (Provision is also included for unborn children.) Under current law, this notice requirement does not apply in a county in which there is no federally recognized Indian reservation but only tribal or individual trust land that is outside the boundaries of a reservation (often referred to as "off-reservation trust land"), unless the county includes land in the BIA service area for the Ho-Chunk tribe. For example, a few acres of land in Milwaukee County are held in trust for the Forest County Potawatomi Community, but that land does not have reservation status under federal law. However, under the bill, the definition of "reservation" would require that notice of a suspected child abuse or neglect report be sent to a tribe in such a county.[18]

b. Current s. 48.57 (3t), Stats., provides that DHFS may enter into an agreement with a tribe to administer the kinship care or long-term kinship care programs within the boundaries of a reservation. The proposed definition would affect this provision.

c. Under current s. 48.685, Stats., a tribe could be administering the rehabilitation review process under the criminal background check law for child care entities located within the boundaries of a reservation. The proposed definition would affect this provision.

d. Current ss. 938.185 (4) (b), 938.24 (2r) (a) 2., and 938.255 (1) (cr) 1. c., Stats., have certain procedures that apply in certain circumstances when a juvenile commits a delinquent act outside the boundaries of a tribe's reservation and off-reservation trust land. (Section 938.02 (12m) defines "off-reservation trust land" for this purpose, and current s. 938.02 (15c), Stats., defines "reservation.") The proposed definition of "reservation" in the bill would affect these provisions. It would make the current definition of "off-reservation trust land" in s. 938.02 (12m) and these references to "off-reservation trust land" nonsensical.

15. ***Reports of Suspected Abuse to Neglect to Tribal Agents.*** In addition to amending the definition of "reservation" for purposes of s. 48.981, as discussed above, the bill amends various provisions in s. 48.981 relating to reports of suspected child abuse or neglect, including changing the tribal agent of which tribe is to be notified. ICWA does not require notice to a tribal agent of a report of suspected child abuse or neglect.

16. ***Non-ICWA JIPS Ground.*** The bill amends s. 938.21 (3) (ag) by removing the reference to the JIPS ground under s. 938.13 (14) based on a determination that a juvenile is not responsible for a delinquent act by reason of mental disease or defect or has been determined not competent to proceed and then inserting the reference in s. 938.21 (2) (ag). This means that current law regarding how proceedings relating to such juveniles are handled will be changed from using the process in s. 938.21 (3) to instead using the process in s. 938.21 (2). Also, s. 938.30 (1) changes the time of hearing for those under the JIPS ground under s. 938.13 (14). These changes are not related to ICWA, which does not cover this JIPS ground.

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[18] Neither current law nor the bill requires that notice of a suspected child abuse or neglect report be provided to a tribal agent about an Indian child if there is no land defined as "reservation" in that county, even though a child may be clearly identified as an Indian child from a specified tribe.

17. ***Applicability of Definition of "Indian Custodian" to other ch. 938 Proceedings.*** "Indian custodian" is defined for all purposes in ch. 938 by s. 938.02 (8p). The changes made in ss. 938.19, 938.20, 938.21 (3) (b), (d), and (e), and 938.30 (2) relating to an Indian custodian will apply not only to the four ICWA JIPS grounds but will also apply to proceedings involving delinquency and the two JIPS grounds relating to delinquency that are not covered by ICWA. These changes, as applied to proceedings not covered by ICWA, are not required by ICWA.

18. ***Continuance in ch. 938 Proceedings not Related to ICWA.*** Section 938.315 (1) (a) 11. provides for a continuance, not to exceed 20 days, granted at the request of a parent, Indian custodian, or tribe of a juvenile who is or may be an Indian juvenile, to enable the requester to prepare for a proceeding under any of the four ICWA JIPS grounds. However, s. 938.315 (2) provides that a court may grant a continuance upon a showing of good cause, including on the request of a person specified in s. 938.315 (1) (a) 11.

If s. 938.315 (2) is intended to provide for a continuance over and above the 20 days in s. 938.315 (1) (a) 11., it appears that s. 938.315 (1) (a) 11. should cross-reference this exception.

If s. 938.315 (2) is interpreted as referring to the individuals and entity specified in s. 938.315 (1) (a) 11. (that is, parent, Indian custodian, and tribe) but not as being limited to a proceeding referred to in s. 938.315 (1) (a) 11. (that is, as not being limited to proceedings involving one of the four ICWA JIPS grounds), then the bill provides potential rights to an Indian custodian and tribe in ch. 938 proceedings that are not related to ICWA (for example, matters relating to delinquency and the two JIPS grounds that are not related to ICWA).

TECHNICAL COMMENTS

In reviewing the bill, the following technical issues were noted:

1. On page 18, line 23, "or tribal court" should be changed to "or the tribal court."

2. On page 21, line 22, it appears that "The court shall" should be changed to "The court or jury shall" in order to be consistent with page 21, line 19. Also, on page 23, line 3, it appears that reference should be added to "or jury's" consideration of whether active efforts were made in order to be consistent with s. 48.028 (4) (d) 2.

3. Page 21, line 13 and page 119, line 15 refer to the requirements that must be met before a court may order removal of an Indian child from the Indian child's or juvenile's "home" and placement in out-of-home care. It appears that the word "home" should be further qualified so that it does not include removal of an Indian child from a home in which the Indian child's only parents are adoptive parents who are non-Indian. The reason is that, because ICWA does not define a "parent" as including a non-Indian adoptive parent [25 U.S.C. s. 1903 (9)], ICWA does not define proceedings relating to a removal from a non-Indian adoptive parent and subsequent placement as a "foster care placement" [25 U.S.C. s. 1903 (1) (i) (defined as removal from a "parent" or "Indian custodian")]; thus, it is not a child custody proceeding under 25 U.S.C. s. 1903 (1) that is subject to ICWA.

However, if the intent is to impose these requirements even if not required by ICWA, these provisions should be included in the second category of this memorandum, above.

Sections 48.028 (3) (a) and 938.028 (3) (a) relate to a child custody proceeding as defined by ICWA and an "out-of-home care placement" as defined in ss. 48.028 (2) (e) and 938.028 (2) (c). Sections 48.028 (2) (e) and 938.028 (2) (c) are consistent with ICWA in referring to removal from the Indian child's parent or Indian custodian, which, as noted above, does not include a non-Indian adoptive parent. Similarly, ss. 48.028 (3) (a) and 938.028 (3) (a) limit their application to a child custody proceeding (which, as noted above, does not include removal from a non-Indian adoptive parent or from a person who is not a parent or Indian custodian).

However, both provisions also state that they apply regardless of whether the Indian child is in the legal or physical custody of an Indian parent, Indian custodian, extended family member, or "other person." To the extent that this additional language is intended to counteract the definition of "child custody proceeding" in ICWA and apply when a non-Indian adoptive parent is involved, these provisions should be included in the second category of this memorandum, above.

If that is not the intent, language could be added to make it clear that that is not the intended effect. Alternatively, if the first sentence is not intended to modify ICWA, it could be deleted as surplusage.

4. Section 48.028 (3) (e) does not specify that a tribe or Indian custodian may intervene in a return of custody proceeding. However, s. 48.028 (4) (a) requires notice of a right of intervention to a tribe, Indian custodian, and even former Indian custodian in a return of custody proceeding.[19]

5. On page 27, line 19, "export witness" should be changed to "expert witness."

6. Current s. 48.30 (6) (a), Stats., provides that if a CHIPS or UCHIPS petition is not contested, the court must set a date for the dispositional hearing which allows reasonable time for the parties to prepare but is no more than 10 days after the plea hearing for a child who is held in secure custody and no more than 30 days after the plea hearing for a child or an expectant mother who is not held in secure custody. The bill specifies that this provision is subject to s. 48.299 (9) which, in the case of notice to the Interior Secretary, means a delay of at least 25 days after the Interior Secretary has received the notice.

However, s. 48.30 (6) (a) also provides (in a separate sentence) that if all parties consent, the court may proceed immediately with the dispositional hearing. It is not clear whether consent of the parties can allow proceeding immediately with the dispositional hearing in such a case or if the delay provisions in s. 48.299 (9) would still apply. That is, it is not clear whether all current parties can agree

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[19] There is some ambiguity in ICWA as to whether return of custody proceedings are considered to be subject to the notice and delay and intervention provisions in ICWA that apply to involuntary foster care placements. Under ICWA, the former parent or former Indian custodian has the choice of whether to petition for the return of custody if an adoption is vacated or set aside or if there is a TPR of all adoptive parents. Thus, it could be argued that a return of custody proceeding involves neither an involuntary proceeding nor a foster care placement. On the other hand, the return of custody process under 25 U.S.C. 1916 (a) requires a return of custody to a biological parent or prior Indian custodian unless there is a showing, in a proceeding subject to the provisions of 25 U.S.C. s. 1912, that a return of custody is not in the child's best interests. As noted above, 25 U.S.C. s. 1912 (a) relates to foster care placements and TPR and provides for notice, delay, and intervention--thus suggesting that these provisions apply to a return of custody proceeding, or at least to one that is contested.

to proceed immediately or if delay is required because of the chance that other parties may be added later once notice is received.

A similar comment applies to: ss. 48.31 (7) (a) (date for CHIPS or UCHIPS fact-finding hearing); 48.222 (2) (date of TPR fact-finding hearing); 938.30 (6) (a) (date for ICWA JIPS dispositional hearing); and 938.31 (7) (a) (date for ICWA JIPS fact-finding hearing).

Other provisions in the bill use a different drafting approach by referring to when a hearing is held and provide for immediately proceeding with the consent of all parties--but apparently imposing the delays required by ICWA. For example: ss. 48.357 (1) (c) 2. and (2m) (b) and 938.357 (1) (c) 2. and (2m) (b) provide for a change in placement hearing to begin immediately with consent of all the parties, but ss. 48.357 (1) (c) 2m. and (2m) (bm) and 938.357 (1) (c) 2m. and (2m) (bm) apparently impose the delays required by ICWA--although ss. 48.357 (1) (am) 2. and 938.357 (1) (am) 2. make this less clear by referring to changing a placement without waiting for a state statutory delay to expire if written waivers of objection are signed by specified entities. At a minimum, ss. 48.357 (1) (c) 2. and 938.357 (1) (c) 2. should cross-reference the exception in ss. 48.357 (1) (c) 2m. and 938.357 (1) (c) 2m., respectively.

In summary, it would be helpful to clarify these provisions regarding whether proceedings may be held earlier if all parties consent.

7. On page 102, line 7, it appears that the reference to par. (am) should be changed to par. (ag).

Also, it appears that the exception in par. (ag) to the court's ordering an investigation under par. (a) (intro.) should be rephrased to make it clearer that the exception applies only if the tribal child welfare department consents to conducting the investigation. As currently worded, page 102, lines 14 to 15 indicates that the court may make the request if the tribal child welfare department consents.

8. The definition of "Indian child custody proceeding" in s. 938.028 (2) (b) refers to a proceeding under any of the four ICWA JIPS grounds that is governed by ICWA, "in which an out-of-home care placement may occur." Because there is a potential that a juvenile may be placed outside of his or her home in any of these ICWA JIPS proceedings, it appears that the qualification that an out-of-home care placement may occur may cause confusion. See also s. 938.028 (4) (a), which also refers to an ICWA JIPS proceeding involving the out-of-home care placement of a juvenile.

9. On page 146, line 13, it appears that the reference to s. 938.13 (6) (JIPS based on habitual truancy grounds) should be deleted and instead a comparable provision should be added to s. 938.355 (6m). It also appears that the reference on page 146, line 13, to "adjudged to have violated a civil law or ordinance" should exclude a civil law or ordinance enacted under s. 118.163 (1m) or (2). A comparable provision should then be added to s. 938.355 (6m), but only with respect to s. 118.163 (2) (habitual truancy) since this type of sanction for violating a court order imposed for violating a civil law or ordinance enacted under s. 118.163 (1m) (truancy) is not provided for in the statutes.

The reason these changes would be useful is that current s. 938.355 (6), Stats., does not deal with such violations, whereas current s. 938.355 (6m), Stats., does so.

10. On page 169, lines 8 to 11, the only initial applicability provision relates to TPR petitions. However, other provisions in the bill relate to the content of other types of petitions and proceedings that

may be in process when the act takes effect. It appears that additional initial applicability provisions should be included.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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